In the Supreme Court
of the
United States

OCTOBER TERM, 1933

No. 129

JOHN FREULER, ADMINISTRATOR OF THE ESTATE OF LOUISE P. V. WHITCOMB, *Petitioner,*

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

SUPPLEMENTAL MEMORANDUM

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petition heretofore filed in this case avers that the Circuit Court of Appeals erred *inter alia:*

> In holding that the order of the state court was not conclusive on the question as to what amounts were properly distributable to the beneficiaries of the trust.

And among the reasons assigned for granting the writ is the following:

> The decision of the Circuit Court of Appeals in the instant case that the order of the state court is not controlling is directly in conflict with the holding of this court

in *Uterhart* v. *United States*, 240 U. S. 598, 603, and the holding of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Field*, 42 F. (2d) 820, 822.

The decision of the Circuit Court of Appeals in the instant case that the order of the state court is not controlling is also, we submit, in conflict with the holding of the Circuit Court of Appeals for the Tenth Circuit in *Pitman* v. *Commissioner*, 64 F. (2d) 740, decided April 12, 1933, and reported since the petition in the instant case was prepared.

The *Pitman* case was an appeal from a decision of the Board of Tax Appeals involving federal income taxes. The Commissioner contended before the Board that the taxpayer acquired an undivided one-half interest in certain allotted lands by purchase and the other half by inheritance, and that a certain bonus received on leases of these lands was income taxable to the taxpayer. The Board sustained the contention of the Commissioner. The Circuit Court of Appeals, however, said:

> The county court of Tulsa county by its decree of March 30, 1921, adjudged that the whole of the allotment, both homestead and surplus, descended to the petitioner as the sole heir of Pitman, Jr., deceased. This was in accord with the existing decisions of the Supreme Court of Oklahoma. . . . [Citing certain decisions.]
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> It is true that in the case of *In re Estate of Robert Pigeon*, 81 Okl. 180, 198 P. 309, decided April 5, 1921, the Supreme Court of Oklahoma overruled [the prior decisions of the Supreme Court of Oklahoma] . . . But the county court of Tulsa county had jurisdiction to enter the decree of heirship and distribution referred to above (sections 1384 to 1394, inc., C. O. S. 1921; Act of June 14, 1918, 40 St. 606, U S C A, Tit. 25, § 375), and such decree has not been appealed from nor in anywise modified.
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> Proceedings of probate courts are usually in rem. . Free-

man on Judgments (5th Ed.) §1537. A judgment ascertaining and adjudicating heirship and directing the distribution of the estate of a decedent is not a judgment inter partes but a judgment in rem, and is evidence of the facts adjudicated against all the world [citing cases]. . . . It follows that such decree effectually adjudged petitioner to be the sole heir at law of Pitman, Jr., and entitled to inherit the whole of such allotted lands, and that *it is binding on the parties to this proceeding*. We conclude, therefore, that petitioner acquired the whole of the allotted lands by inheritance from Pitman, Jr. [Italics ours.]

The holding of the court as shown by the above extracts is, we submit, directly contrary to that of the Circuit Court of Appeals for the Ninth Circuit in the instant case and also that of the Court of Appeals of the District of Columbia in *Burnet* v. *Whitcomb*, decided on May 22, 1933.

We consequently submit that the conflict established by the *Pitman* case with these decisions is an additional reason for granting the writ in the instant case and in its companion cases—Numbers 130, 131, 139 to 144, and 145 to 150 inclusive, which are all petitions for writs of certiorari now pending in this Court.

The brief of the respondent, after discussing the *Pitman* case and various other cases, asserts (pp. 14–15):

It is believed that the controlling principles have been announced by this Court and for the most part properly applied in the decisions of the lower Federal courts. These principles seem to require the conclusion that a decision of a state court which relates to the effect to be given to a particular will or similar instrument in writing will not be deemed conclusive unless it is required by the application of a state rule of property.

We believe that this is not the proper conclusion in federal tax cases, and that the authorities do not sustain it.

Although some of the cases cited by the respondent hold that the federal courts are not bound in all cases to follow the construction of a will adopted by the state court, the Supreme Court cases cited deal with no federal statute, and do not involve a situation similar to that here involved where the probate court "had the settlement of this estate in its grasp and sole jurisdiction". See *McCaughn* v. *Girard*, 19 F. (2d) 218, 219. Moreover, the latest discussion of any phase of the matter by the Supreme Court—that in *Hawks* v. *Hamill*, 288 U.S. 52—indicates that the doctrine of these cases is extremely limited.

The distinction urged by the respondent is not suggested in *Uterhart* v. *United States*, 240 U. S. 598, or in *Commissioner* v. *Field*, 42 F. (2d) 820 (C. C. A. 2d), or in *McCaughn* v. *Girard Trust Co.*, 19 F. (2d) 218 (C. C. A. 3d), all of which we believe are in conflict with the decision below. The view of the Circuit Court of Appeals for the Second Circuit clearly appears to be contrary to that expressed in the respondent's brief and to that of the court below in the instant case. For in *Farwell* v. *Commissioner*, 38 F. (2d) 791, 795, a Federal estate tax case, it said:

> Because the probate court ratified and approved every payment made by the guardian and no application for re-examination and correction was made within two years, or appeal taken, the decision of that court is final and conclusive. General Laws of Vermont, § 3712. Although the probate court is of limited jurisdiction, its acts, orders, and decrees, within the scope of its jurisdiction are as conclusive as those of any other court. *Sparhawk* v. *Buell's Administrator*, 9 Vt. 41; *Tryon's Administrators* v. *Tryon*, 16 Vt. 313. And the probate court has exclusive jurisdiction of the settlement of accounts of guardians.

Where, as in California, the probate court has exclusive jurisdiction of the settlement of accounts of trustees, its decision must, by like reasoning, be final and conclusive, whether the federal tax involved is an estate or an income tax.

The respondent in his brief in opposition seeks to distinguish certain cases on the ground that in them the decree of the state court in question was entered before the tax year involved, and also relies to some extent upon his inference that the settlement of the trustees' account here was "friendly". We submit that these are not good reasons for opposing our petitions for certiorari. For in *McCaughn* v. *Girard Trust Company*, 19 F. (2d) 218 (C. C. A. 3d), the court held that a decree of a state court was binding on the Government in a federal income tax case, although it was entered by consent long after the taxable year. The following are extracts from the opinion of that court:

> The facts are that John J. Emery, a resident of the state of Maine, died on September 5, 1908, leaving a will in which he directed that the funds involved here should accumulate. While his estate was in the course of administration, the gross income upon this fund was assessed with taxes for the years 1916, 1917 and 1918. Thereafter the question of validity of this accumulation trust was raised in the court of Maine having jurisdiction, with the result that by its decree, ***which was finally entered by consent***, it was adjudged that "the complainants were entitled to the residuary estate absolutely and in fee, free of any trust, as well as the income therefrom with accumulations thereon."
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> . . . . . .
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> We are of opinion that the taxation acts as to estates were passed by Congress with appreciation of the fact that, as a practical administrative question, estates would often

be in an undetermined situation incident to subsequent litigation as to rights thereto, and the taxation liability could not in such cases be fairly determined and justly laid until such disputed questions were determined. In the light of this practical consideration, we are of opinion the taxpayer's right and liability depended on facts, and not on appearances; that such facts, though subsequently determined by judicial decree, justly referred back, in this case, for example, to the date of the testator's death, and the rights which then, as found by subsequent decree, really accrued.

The Court of Maine had the settlement of this estate in its grasp and sole jurisdiction. It was for it to determine whether the fund in question was an accumulating trust, held by the Girard Trust Company under a valid trust created by the will, or whether such trust was invalid, and that, consequently, as to this fund the testator died intestate, and that therefore it was in the hands of the Girard Trust Company as executor, and the real owners were the decedent's heirs under the intestate law. Such being the fact, it follows that the income of this fund was not the property of a trust estate accruing under a trust, but was the income payable individually to the several persons who inherited under the intestate laws.

See, in this connection also, *Farwell* v. *Commissioner*, 38 F. 2d) 791 (C. C. A. 2nd), *supra*.

We believe that the decision in the instant case cannot be reconciled with the decisions of the other Circuit Courts of Appeals referred to in this memorandum and in our brief in support of the petition, and the petition should be granted in order that this Court may authoritatively settle the important

questions as to which he decisions of the Circuit Courts of Appeals are in conflict.

Respectfully submitted,

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